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No. 06-494

IN THE

Supreme Court of the United States

PAUL J. CARMOUCHE, DISTRICT ATTORNEY, 1ST JUDICIAL DISTRICT; ROBERT ROLAND, CHAIRMAN, T.O. PERRY, JR., VICE CHAIRMAN, JOHN W. GREENE, E.L. GUIDRY, JR., R.L. HARGROVE, JR., MICHAEL J. KANTROW, SR., JOSEPH MASELLI, HENRY C. PERRETT, JR., ASCENSION DELGADO SMITH, DOLORES SPIKES, EDWIN O. WARE, III, OF THE LOUISIANA BOARD OF ETHICS AND THE SUPERVISORY COMMITTEE FOR CAMPAIGN FINANCE,

Petitioners,

v.

CENTER FOR INDIVIDUAL FREEDOM,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

The Center for Individual Freedom is a nonprofit, nonstock corporation existing under the laws of the Commonwealth of Virginia. As a nonprofit, nonstock corporation, it has no parent corporation, and no publicly held corporation owns more than 10% of its stock.

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INTRODUCTORY STATEMENT

Nothing about this case justifies singling it out for discretionary review by this Court. The Fifth Circuit's ruling presents no split among the federal courts of appeals, nor does it conflict with this Court's precedents. To the contrary, the Fifth Circuit's careful and accurate analysis of this

Court's decisions accords with that of the Sixth Circuit—the only other circuit to address the point.

Nor is this one of those rare cases in which exceptional public interests demand early intervention by this Court. Louisiana repeatedly told the Fifth Circuit that its statutory definition of "expenditure" was modeled on and intentionally incorporated the meaning of an identically-worded federal statute.[1] The Fifth Circuit merely corrected Louisiana's mistaken belief that the federal definition recently had changed and preserved Louisiana's statute from invalidity by holding that it retained its traditional and intended meaning. This modest ruling—far from the overbroad ruling claimed by the Petition—imposed no new constraints and explicitly left Louisiana free to enact any new definition that conforms to long-settled First Amendment standards, a path that Congress and other states already have taken.[2]

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[1] Petitioners are referred to herein as "Louisiana." Petitioners include the District Attorney for the First Judicial District and members of the Louisiana Board of Ethics and the Supervisory Committee for Campaign Finance, which have authority to interpret and enforce Louisiana's campaign finance laws. La. Rev. Stat. Ann. §§ 18:1511.1, 1511.5, 1511.6.

[2] *McConnell v. FEC*, 540 U.S. 93 (2003), approved Congress' definition of a new category of regulated speech known as an "electioneering communication." New state statutes, constitutional amendments, and rules that adopt analogous "electioneering communication" provisions include the following: Alaska Stat. §§ 15.13.400(5), (6)(C), 15.13.135; Cal. Gov't Code § 85310; Colo. Const. art. XXVIII, §§ 2(7), 6; Fla. Stat. Ann. §§ 106.011(1)(b)3, (18); Haw. Rev. Stat. § 11-207.6; Idaho Code Ann. §§ 67-6602(f); 67-6630; 10 Ill. Comp. Stat. Ann. §§ 5/9-1.5, 1.7, 1.8, 1.14; N.C. Gen. Stat. §§ 163-278.80, .82, .90, .92; Ohio Rev. Code Ann. § 3517.1011; Okla. Ethics Comm'n Constitutional Rules §§ 257:1-1-2, 10-1-2(d); S.C. Code Ann. §§ 8-13-1300(6), (17), (31), 1308; Wash. Rev. Code §§ 42.17.020(20), (21), .565; W.Va. Code Ann. §§ 3-8-1a(10) & 3-8-2b. Some of these go beyond the federal definition and thus may be open to challenge.

Louisiana says the Fifth Circuit erred by not referring this case to the Louisiana Supreme Court. The Petition does not disclose, however, that Louisiana's Brief to the Fifth Circuit did not even suggest such referral, much less attempt to show that it would be permissible or desirable.[3] Instead, Louisiana expressly represented that the case was controlled by the federal definition of "expenditure"—an issue for the federal courts. Moreover, certification likely would have failed under Louisiana's narrow certification rule and, given Louisiana's unique legal system, could not have produced a definitive answer. And the notion that judicial construction could have entirely rewritten the Louisiana statute, substituting Congress' complex and detailed definition of "electioneering communication," is wholly implausible.

The Petition boils down to a fervent argument that the Fifth Circuit committed ordinary legal error. The Petition is wrong. But even assuming arguendo such error had occurred, it would not elevate this case to one of the relative handful reviewed each term. For these reasons, the Petition should be denied.

1. STATEMENT OF THE CASE

(a) Background

Respondent Center for Individual Freedom ("Center") seeks to advance personal liberty through various means, including public advertising. Pet. App. at 2.[4] It has found the

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[3] After the panel majority ruled against it, Louisiana then petitioned the en banc court to order certification—without showing that Louisiana's stringent certification standards could be met or what would be accomplished—but no member of the Fifth Circuit supported en banc review of this belated effort.

[4] All citations to the Court of Appeals' opinion herein are to the version contained in the Appendix to Louisiana's Petition. The published version of the Fifth Circuit's opinion may be found at *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006). The Appendix to

public to be most receptive to its messages when impending elections have aroused an interest in public policy issues and candidates provide concrete examples of its policy points. As a matter of principle, however, the Center will not make the type of intrusive and burdensome disclosures often required by campaign finance legislation as the price of speech that is sufficiently related to elections and candidates. *Id.* Indeed, if the law is unclear, so that contemplated speech may subject the Center to such requirements, the Center will stand mute, as actually occurred in this case. *Id.* Thus, the Center has a vital interest in knowing in advance exactly what speech will subject it to regulation so it need not hedge and trim to steer wide of vague restrictions. That interest, of course, also is shared by members of the public who are denied the ability to receive the Center's speech when it is chilled into silence.

Louisiana's campaign finance statute long has defined regulated "expenditures" using the same language as its federal analog. *Compare* La. Rev. Stat. Ann. § 18:1483(9)(a) ("anything of value made for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person to public office") *with* 2 U.S.C. § 431(9)(A)(i) ("anything of value, made by any person for the purpose of influencing any election"). This was no accident. As Louisiana explicitly and repeatedly explained to the Fifth Circuit: "The Louisiana definition . . . must therefore be—and is intended to be—interpreted consistently with [*Buckley*'s express advocacy] directive." Resp. App. at 2a (Br. for Appellees at 14).[5] The state definition "was carefully modeled after the [federal] statute" that was construed in *Buckley v. Valeo*, 424 U.S. 1 (1976), and the district court

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this Opposition contains relevant excerpts of other documents cited herein.

[5] *See also* Resp. App. at 2a (Br. for Appellees at 11) ("the challenged Louisiana statute was carefully modeled after the [federal] statute in *Buckley* to ensure constitutionality").

agreed that it used "*exactly* the same . . . language [construed in] *Buckley*" to convey the same meaning. Resp. App. at 4a (Pet. for En Banc Reh'g at 5).[6] An echo of these statements appears in Louisiana's Petition to this Court (at 22) which states: "The Louisiana statute was carefully tailored after the federal statute that was the subject of examination in the *Buckley* decision."

Under the traditional *Buckley* definition that Louisiana law incorporated, spending for speech is not a regulated "expenditure" unless the speech uses explicit words such as "vote for" or "elect" to expressly "advocate the election or defeat of a clearly-identified candidate." 424 U.S. at 44 & n.52. That precise and objective definition permitted the Center to know in advance and with confidence whether contemplated speech would subject it to intrusive regulation.

The Center previously had run issue ads in Louisiana. Resp. App. at 6a (Br. for Appellant at 7). In the fall of 2004, the Center was preparing to run an ad discussing justice themes illustrated by candidates in a pending election. The Center became aware that the Louisiana Board of Ethics (members of which are among the Petitioners here) was investigating other advertising that did not use explicit words of express advocacy. *See* Letter from Louisiana Board of Ethics to Republican State Leadership Committee (Apr. 12, 2004) *available at* http://domino.ethics.state.la.us/CampOpn.nsf/999d109733135c25862567f8006847bf/d94c48701c6e172986256e750054742a?OpenDocument&Highlight=0,2003-746. There were assertions that recent federal authority, notably *McConnell v. FEC*, 540 U.S. 93 (2003), had altered the meaning of the statute on which Louisiana's provision was based and, hence, also had changed the meaning of the

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[6] *See also* Resp. App. at 4a (Pet. for En Banc Reh'g at 1 n.1) ("The Louisiana statute was carefully crafted to comport with the *Buckley* language. . . .").

identical state provision. The Center was concerned that Louisiana was regulating independent speech based on its own assessment of what speakers subjectively hoped to achieve and what listeners would understand, without any need for explicit words of express advocacy. *See, e.g.*, Opinion of the Louisiana Board of Ethics, No. 2003-746, *In the Matter of Republican State Leadership Committee* (Jan. 13, 2005) *available at* http://domino.ethics.state.la.us/CampOpn.nsf/999d109733135c25862567f8006847bf/329237426fde436486256f8d005d9657?OpenDocument&Highlight=0,2003-746. Accordingly, the Center's advertisement carried the risk of being classified as a regulated "expenditure."

(b) Trial Court Proceedings

Unwilling to risk intrusive and burdensome regulation, the Center suspended its planned ad and brought suit contending that, under *Buckley*, and its progeny, a statute that regulated core, independent speech based on the subjective and predictive definition Louisiana appeared to be pursuing was unconstitutional. Pet. App. at 2. Naming Louisiana's campaign finance enforcement authorities as *Ex Parte Young* defendants, the Center sought preliminary relief to permit it to proceed with its planned ad and final relief to allow it to speak in the future. *Id.* at 3. The district court denied preliminary and permanent relief, and the Fifth Circuit denied relief pending appeal. *Id.* at 3.

(c) The Fifth Circuit Decision

On appeal, Louisiana's merits brief did not seek certification of any question to the Louisiana Supreme Court, nor did it contend that the controlling issue was one of state law. Instead, it explicitly maintained that (i) Louisiana's statute was intentionally modeled on and intended to have precisely the same meaning as the identically-worded federal statute construed in *Buckley* (Pet. App. at 12); (ii) because of this identity of meaning with the statute upheld in *Buckley*, the

Louisiana statute could not be facially unconstitutional (*id.*); and (iii) because *McConnell* had altered the federal definition, making it depend on subjective and predictive judgments, the state definition now had that same new meaning (*id.* at 15).

The Fifth Circuit agreed with Louisiana in every respect but one. It accepted that the state definition of "expenditure" was intended to and did have the same meaning as the identical federal language. *Id.* at 12-14. It further accepted that, because *Buckley* held that a statute with such a meaning satisfied the First Amendment, Louisiana's identical statute likewise was facially constitutional. *Id.* at 14. Indeed, it agreed that Louisiana was free to enact alternative legislative definitions crafted to satisfy the First Amendment, just as Congress had done in the statute affirmed in *McConnell*. *Id.* at 16.

The Fifth Circuit disagreed, however, with Louisiana's claim that *McConnell* altered the federal definition that the state statute incorporated. *Id.* at 15-16. Instead, the Fifth Circuit read *McConnell* to uphold a detailed new legislative definition that was found to be at least as precise and objective as *Buckley*'s "express advocacy" definition. *Id.* at 16. The earlier federal provision—which remains in effect for many purposes—retained the meaning *Buckley* had given it. Louisiana's statute likewise continued to have the same "express advocacy" meaning *Buckley* had declared, that Louisiana said it had intentionally adopted, and that saved the statute from facial invalidity. *Id.* at 17. This holding simultaneously foreclosed the Center's facial challenge and provided the Center with the clear advance guidance it had sought. *Id.* (The correctness of the Fifth Circuit's reasoning and its consistency with other authority is demonstrated below).

Rather than enacting additional or alternative definitions of regulated speech, Louisiana sought rehearing en banc. Its Petition for Rehearing largely rehashed earlier arguments, but

added a request—not made in Louisiana's merits brief—to certify the question of the statute's meaning to the Louisiana Supreme Court. No member of the Fifth Circuit supported en banc intervention, which was denied. *Id.* at 34-35. Louisiana then petitioned this Court for certiorari.

2. REASONS FOR DENYING THE WRIT

None of the factors this Court has identified as possible grounds for granting certiorari apply here.

(a) There Is No Circuit Split

Louisiana's Petition is most striking for what it omits. It says nothing about the views of other courts of appeals, failing even to cite, much less discuss, *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), *cert. denied*, 543 U.S. 956 (2004). The reason for this thundering silence is that there is no disagreement between the circuits. To the contrary, when the Sixth Circuit considered how *McConnell* affected *Buckley*'s "express advocacy" definition, it reached the same conclusion as the Fifth Circuit here. *Id.* at 664-66. The Ninth Circuit has cited the Sixth Circuit's core conclusion with approval.[7]

These authorities supporting the Fifth Circuit are discussed in more detail in the following section, which demonstrates that the Fifth Circuit's ruling is legally correct. The immediate point is simply that Louisiana is asking this Court to grant review on an issue where there is no circuit split.

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[7] *ACLU of Nev. v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004). The thrust and holding of *Heller* concerned the right to anonymous speech. However, in setting its analytical framework, *Heller* said: "as stated recently by the Sixth Circuit, *McConnell* 'left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness.'" *Id.* (quoting *Anderson*, 356 F.3d at 664-65).

Thus, a "principal purpose" of certiorari review is lacking here. *See Brayton v. United States*, 500 U.S. 344, 347 (1991).

(b) The Fifth Circuit Correctly Analyzed This Court's Controlling Precedents

Unable to identify a split in the circuits, the Petition (at 8) contends that the decision of the Fifth Circuit (and presumably the unmentioned Sixth Circuit) is "irreconcilable with . . . *McConnell*." That is a telling choice of words. This Court's Rule 10(c) says certiorari may be granted to review a decision that "conflicts" with decisions of this Court. As a rule, the type of conflict contemplated "must truly be direct and must be readily apparent." Robert Stern, et al., *Supreme Court Practice*, 233 (8th ed. 2002). After all, working out the implications of this Court's rulings is bread and butter for the courts of appeals, so that a looser standard would open the door to extensive review of claimed ordinary error. It would be remarkable if the Fifth Circuit's ruling construing a vaguely-worded Louisiana statute modeled on a similarly-vague federal law could be said to "conflict" with *McConnell*'s approval of a different statute whose new, detailed, precise, and objective language did not call for construction. At most, the Petition is arguing that some of *McConnell*'s reasoning pointed in a different direction than the Fifth Circuit took. Such an argument could not justify certiorari if it were correct, and here it is mistaken.

Public speech concerning public policy lies at the very heart of the First Amendment. *Buckley*, 424 U.S. at 14-15. The language of the First Amendment commands in absolute terms that Congress shall make "no law" restricting such speech. *Buckley* held that compelling necessity could overcome that seemingly absolute ban, but that such laws must meet demanding standards of clarity and precision, particularly where they carry criminal or civil penalties, as does the Louisiana statute. 424 U.S. at 40-41. Among other things, such a statute must draw a clear and objective bright

line so that speakers do not "hedge and trim," suppressing core First Amendment speech to avoid legal risk. *Id.* at 41-43. This is a much higher standard than the ordinary due process standard of vagueness, reflecting the extreme constitutional sensitivity of regulating and punishing public speech on public policy—legislating where the First Amendment's text permits "no law." Absent such a bright line, there is an unacceptable risk that speakers will hedge and trim, refraining from core speech that the law does not forbid. *Id.* at 41 n.48.

Buckley held that federal statutory language regulating speech "'for the purpose of influencing' an election" did not itself provide the clear advance guidance the First Amendment required. *Id.* at 42-43. It held inadequate a D.C. Circuit proposal to construe the phrase to mean speech that simply advocated the election or defeat of a candidate, explaining that the First Amendment did not permit speakers to be subjected to the risk of differing judgments as to their intent or the likely understandings by hearers. *Id.* at 42 & n.49. Instead, to assure that permissible core speech would not be chilled by uncertainty, *Buckley* construed the federal language to apply only to speech using "explicit words" such as "elect" or "vote for" to "expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 78-80 (referring to 424 U.S. at 44 & n.52); *see also Chamber of Commerce of the U.S. v. Moore*, 288 F.3d 187, 194-95 (5th Cir. 2002) (discussing the *Buckley* standard as it persisted through the years). It was this construction, and not the federal language, that avoided facial invalidity.

Buckley flatly acknowledged its bright line test could readily be circumvented simply by avoiding explicit words of advocacy. 424 U.S. at 45. But it held that the First Amendment's demand that speakers receive precise advance guidance prevailed over desires for broader coverage. *Id.*

As discussed above, *McConnell* construed *Buckley* to control the construction of vague legislation restricting core election-related independent speech, rather than as a constitutional limit on precise and tailored legislation. It held that Congress' definition of a new category of regulated election-related speech—which laid out in detail the media, time, speakers, and content regulated—was at least as precise as *Buckley*'s express advocacy standard. *McConnell*, 540 U.S. at 194. Thus, in *McConnell*, there was no unconstitutional vagueness to be cured, and there was no occasion to alter *Buckley*'s holdings concerning vague definitions.

For these reasons, the Fifth Circuit correctly held that *McConnell* did not alter the federal definition that the Louisiana statute incorporated. Pet. App. at 15-16. Thus, the existing Louisiana statute was construed to require explicit words of express advocacy, although the state was left free to follow the lead of Congress and other states in attempting to craft alternative statutory definitions that would provide the precise and objective bright line that the First Amendment demands in this highly sensitive area.

The Fifth Circuit's analysis is strongly supported by the Sixth Circuit's ruling in *Anderson v. Spear*. There, the Sixth Circuit confronted a Kentucky statute that excluded "electioneering" speech from a wide zone around polling places. 356 F.3d at 663. The Sixth Circuit found that the undefined term "electioneering" posed the same concerns of vagueness and overbreadth that led *Buckley* to adopt the "express advocacy" standard. *Id.* at 663-66. It recognized that *McConnell* had held that the "express advocacy" standard was not constitutionally compelled and did not reach much speech that was intended to and did affect elections. *Id.* at 664-65. However, because the statute had not provided a definition that satisfied the First Amendment standards established in *Buckley*, the Sixth Circuit saved Kentucky's statute by construing it to apply only to "speech which

expressly advocates the election or defeat of a clearly identified candidate or ballot measure." *Id.* at 665.

Anderson was a harder case because the state statute was not identical to a federal provision, it had not been adopted for the specific purpose of incorporating the federal standard, and Kentucky did not contend that its statute's meaning was established by federal authority. Even so, *Anderson* held that, in the absence of a precise and objective legislative definition, *Buckley*'s "express advocacy" definition should apply, and that nothing in *McConnell* held otherwise. *Id.* at 664-65. This holding strongly supports the ruling of the Fifth Circuit.

Thus, the Fifth Circuit's ruling correctly construed this Court's relevant precedent. Certainly it does not present the type of "conflict" with *McConnell* that would warrant certiorari.

(c) No Question of Exceptional Importance Demands Review

Louisiana's claim (Pet. at 21-22) that a question of exceptional importance justifies review is greatly exaggerated. As discussed above, the Fifth Circuit ruling gives the state statute the meaning that Louisiana concedes it was intended to have, that it had for many years, and that the identical federal statute continues to have. Moreover, the Fifth Circuit made explicit that the state is free to follow the lead of Congress (and other states) in seeking to craft new legislative definitions that will satisfy the First Amendment's demand for precise and objective standards while achieving whatever broader coverage can be sufficiently justified.

The impact of the Fifth Circuit's ruling simply is not of a magnitude that might make this one of the 100 or so cases this Court accepts each year. Moreover, as demonstrated above, there is no substantial question that the Fifth Circuit's ruling was correct. Thus, this simply is not one of those

unusual situations in which review is justified by a question of exceptional importance.[8]

(d) The Fifth Circuit's Ruling Was A Narrow Response To The Facts Before It

Louisiana asserts that, by declaring what the Louisiana statute meant, the Fifth Circuit granted broader relief than was justified by the facts. Pet. at 22-24. In fact, this is a conventional means of avoiding a facial challenge, as *Buckley* itself demonstrates.

Louisiana fails to cite a single case in which a facial First Amendment vagueness challenge was avoided by a narrowing construction without actually stating that construction. Nor does Louisiana offer any claim or showing that its argument presents an important issue on which the circuits are split.

Moreover, the Fifth Circuit did not itself create the definition that saved the statute. As discussed above, Louisiana expressly and repeatedly argued that the state statute could not be facially invalid because it had the same meaning as the federal statute construed and sustained in *Buckley*. The Fifth Circuit accepted that position, then held that *McConnell* had not changed that meaning, and stated what that meaning was. Pet. App. at 12-17.

Louisiana's argument here simply misses *Buckley*'s critical point. Public policy speech has such high constitutional value that it must not be curtailed by the need to trim and hedge and steer clear of the regulated area. Instead, such speakers are

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[8] To be clear, having a precise and objective standard by which to judge whether its public speech will subject it to intrusive and burdensome regulation is extremely important to the Center and many other similar speakers, as well as the public that receives their speech. Thus, if the Fifth Circuit had sustained Louisiana's position, an error of exceptional importance would have occurred. But that is not the situation here.

entitled to a precise and objective bright line test that allows them confidently to know in advance just what is and is not forbidden. If Louisiana's statute lacked such a bright line meaning, it would be facially invalid.

(e) Louisiana's Brief Did Not Seek Or Justify Certification To The Louisiana Supreme Court, Nor Does The Belated Certification Argument Warrant Certiorari

Louisiana's Fifth Circuit Brief did not ask for certification of any issue to the Louisiana Supreme Court, nor did it attempt to explain how such certification would have been useful. To the contrary, Louisiana expressly represented that its statute was intended to and did adopt a federal definition and argued that the rulings of this Court concerning that federal definition thus also controlled the meaning of the state statute. *See supra* at 6-7. The Center did not dispute those representations—they were made by the state agency entrusted with responsibility for construing and enforcing the statute, they reflected a traditional understanding, and they are consistent with Louisiana authority that a state statute modeled on a federal statute generally takes its meaning.[9] Thus, Louisiana is asking this Court to grant certiorari to review the Fifth Circuit's supposed error in failing to *sua sponte* perceive a need for certification that Louisiana's argument rendered unnecessary.[10] That would be remarkable.

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[9] When Louisiana statutes parallel or are modeled on federal law, Louisiana courts are "guided by federal jurisprudence." *Dufour v. Union Pac. R.R. Co. Mo. Pac. R.R. Co.*, 610 So. 2d 843, 846 n.4 (La. Ct. App. 1992); *see also State v. Touchet*, 759 So. 2d 194, 197 (La. Ct. App. 2000) (where state statue is "parallel" to federal statute, federal construction is "persuasive"); *Madison v. Travelers Ins. Co.*, 308 So. 2d 784, 786 (La. 1975) (same).

[10] Moreover, having prevailed in the district court and in defeating the Center's motion for preliminary appellate relief, Louisiana may well have

This Court has been clear that the failure of a party to seek certification before a court of appeals panel rules on the merits undercuts a later certification request, if it does not bar it altogether. *See Stenberg v. Carhart*, 530 U.S. 914, 945 (2000) (noting the absence of a certification request from the brief in the court of appeals as a reason not to certify); *City of Houston v. Hill*, 482 U.S. 451, 467 n.16 (1987) (city's failure to seek abstention "until it had lost on the merits before the panel . . . undercut the force of the city's argument" but was not an absolute bar). Delay is particularly inexcusable where, as here, the purpose of the litigation is to relieve an ongoing chill to core First Amendment speech. In such cases, federal courts prefer to avoid delays, including the delays associated with referring issues to state court without clear justification. *See id.* at 467; *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1032 (5th Cir. Unit A June 1981).

Moreover, because certification burdens two courts with one case, certification is appropriate only where the likely benefits exceed its costs. *See Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417, 426 (5th Cir. 2001); *Jefferson v. Lead Indus. Ass'n*, 106 F.3d 1245, 1247 (5th Cir. 1997); *Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274-75 (5th Cir. 1976) ("practical" factors including procedural doubts disfavor certification).

Thus, in addition to acting promptly, a party seeking certification must demonstrate that the statute is "obviously susceptible" to a construction that will avoid the constitutional issue. *Hill*, 482 U.S. at 468; *Stenberg*, 530 U.S. at 945 ("fairly susceptible"). "A federal court may not properly ask a state court if it would care, in effect, to rewrite a statute." *Hill*, 482 U.S. at 471. At the same time, however, if the available narrowing construction is "readily apparent" to the

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made a tactical judgment that it could obtain a swift and definitive victory from the Fifth Circuit.

federal court, then there is no need for certification. *Stenberg*, 530 U.S. at 944.

Louisiana's brief to the Fifth Circuit plausibly (and correctly) contended that the state definition of "expenditure" was intended to be the same as the federal definition. Resp. App. at 2a (Br. for Appellees at 11, 14). The close similarity of language and purpose made that understanding highly probable, as did the fact that it was advanced by the state agency entrusted with construing the statute. Since the Center did not dispute that point, and the panel accepted it, Louisiana is in no position *now* to argue that certification was necessary. *See Tanks v. Lockheed Martin Corp.*, 417 F.3d 456, 460 (5th Cir. 2005) (no certification where no practical effect). Louisiana's argument that its definition properly incorporated subjective and predictive elements flowed entirely from its view that the federal definition had been so construed. The meaning of federal law, of course, was a federal matter for the Fifth Circuit.

The Petition's section (at 24-27) arguing for certification makes no attempt to show that Louisiana's statute plausibly could be given a construction other than the one that Louisiana contended for below and that was adopted by the Fifth Circuit. In an earlier section, however, the Petition asserts (at 20) that the Louisiana statute should be given the same meaning as the "electioneering communication" standard upheld in *McConnell*. But that standard was carefully crafted by Congress, which specified which media were to be regulated during which time periods, provided that specific numbers of voters could receive the speech. 2 U.S.C. § 434(f)(3). To ask the Louisiana Supreme Court to impose that meaning on a state statute would be to ask it "in effect, to rewrite a statute," which federal courts cannot do. *Hill*, 482 U.S. at 471.

The Petition also does not discuss Louisiana's certification rule and practice or respond to the Center's showing, made in

response to the Petition for Rehearing En Banc, that there is grave doubt certification would be accepted. Our research suggests that, over the last fifteen years, the Fifth Circuit certified about one case per year to the Louisiana Supreme Court, and that court has rejected about half of those cases. *See Marston v. Red River Levee & Drainage Dist.*, 632 F.2d 466, 468 n.3 (5th Cir. 1980) (noting low acceptance rate and wasted time). That low rate has occurred despite the Fifth Circuit's careful and sparing use of such certification.

Ignored by the Petition, there are substantial procedural obstacles to certification. The first difficulty arises because Louisiana Supreme Court Rule XII, §1, limits certification to matters that "*are* determinative of said cause *independently of any other questions* involved in said case" (emphasis added). This language is much more demanding than the "Uniform Certification of Questions of Law [Act] [Rule]," which speaks of questions that "*may* be determinative of an issue" (emphasis added) without mentioning other questions in the case. National Conference of Commissioners on Uniform State Laws, Uniform Certification of Questions of Law [Act] [Rule] (1995) § 3, *available at* http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ucqla95.htm. It also is more demanding than the authorizing Louisiana statute, La. Rev. Stat. Ann. § 13:72.1, which omits the phrase "independent of any other questions." This obviously intentional variance suggests that the point is important. The Fifth Circuit has taken care to respect this aspect of the Louisiana rule. *See Pac. Lining Co. v. Algernon-Blair Constr. Co.*, 812 F.2d 237, 242 (5th Cir. 1987) (this Court certified "to the Louisiana Supreme Court that its answer . . . will be determinative in . . . resolving all issues remaining in contention"); *Marrogi v. Howard*, 248 F.3d 382, 386 (5th Cir. 2001) (explaining how the Louisiana Supreme Court answer "will determine the issue").

In this case, any construction the Louisiana Supreme Court might give to the Louisiana definition would then remain

subject to federal evaluation under the First Amendment.[11] Thus, the Louisiana Supreme Court's answer would not be determinative, but would merely be grist for the federal judicial mill. *See Brewer v. Memphis Publ'g Co.*, 626 F.2d 1238, 1242 n.5 (5th Cir. 1980) (an open issue of constitutionality precludes certification); *Rubino v. Lynaugh*, 845 F.2d 1266, 1271 (5th Cir. 1988) (to permit a dispositive state answer, a federal court must resolve constitutional issues before certification); *Lucas v. United States*, 807 F.2d 414, 421 (5th Cir. 1986) (all potentially dispositive federal issues must be decided before certification). In theory, this Court might analyze in advance the constitutionality of all possible constructions and then ask the Louisiana Supreme Court to pick one. In practice, such an approach would not be practical here and would involve a great deal of hypothetical constitutional adjudication, contrary to settled policy.

Also, Louisiana's civilian heritage makes certifying questions to the Louisiana Supreme Court less meaningful than in common law states. The highest source of statutory interpretation in Louisiana is not its Supreme Court but its legislature, which freely enacts fully retroactive interpretive laws. *See In re Orso*, 283 F.3d 686, 695-[illegible] (5th Cir. 2002). Moreover, judicial precedent lacks the force in Louisiana it has elsewhere. *Id.* A solid line of cases may establish "jurisprudence constante" that receives deference. *Id.* at 695 n.29. But "in Louisiana, courts must begin every legal analysis by examining primary sources of law: the State's Constitution, codes, and statues." *Id.*

These considerations have dual significance. First, in contrast to other states, certification to the Louisiana Supreme Court does not produce a definitive construction of state law; the ruling remains subject to free reinterpretation by the

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[11] A federal court cannot "certify the entire constitutional challenge to the state court . . . for certified questions should be confined to uncertain questions of state law." *Hill*, 482 U.S. at 471 n.23.

legislature and significant reassessment in subsequent cases. Second, because Louisiana's legislature may act *sua sponte*, the most authoritative source of statutory construction in Louisiana has had ample time to address the present dispute and has chosen not to act. Of course, certification to the Louisiana Supreme Court may yield useful guidance in some cases, but the considerations are significantly different than in other states.

But there is no need to plumb the intricacies of civilian practice or Louisiana procedure to reject certification here. The Fifth Circuit accepted Louisiana's position that its definition was identical to the federal definition. Louisiana has made no showing that it was error to do so. For that reason alone, certification was properly denied.

CONCLUSION

None of the factors that traditionally support a grant of certiorari are present here. The Petition should be denied.

Respectfully submitted,

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November 22, 2006

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNITED STATES OF AMERICA,

No. 05-30212

CENTER FOR INDIVIDUAL FREEDOM,
Plaintiff-Appellant,

v.

PAUL J. CARMOUCHE, DISTRICT ATTORNEY, 1ST JUDICIAL DISTRICT; ROBERT ROLAND, CHAIRMAN, T.O. PERRY, JR., VICE CHAIRMAN, JOHN W. GREENE, E.L. GUIDRY, JR., R.L. HARGROVE, JR., MICHAEL J. KANTROW, SR., JOSEPH MASELLI, HENRY C. PERRETT, JR., ASCENSION DELGADO SMITH, DOLORES SPIKES, EDWIN O. WARE, III, OF THE LOUISIANA BOARD OF ETHICS AND THE SUPERVISORY COMMITTEE FOR CAMPAIGN FINANCE,
Defendants-Appellees.

ON APPEAL FROM A DECISION AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR APPELLEES, THE LOUISIANA BOARD OF ETHICS AND ITS INDIVIDUAL MEMBERS

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* * * *

SUMMARY OF THE ARGUMENT

A. The Ruling of the District Court was correct.

The Honorable District Court, below, was correct in its conclusion that the challenged Louisiana statute was carefully modeled after the statute in *Buckley* to ensure constitutionality: "for the purpose of . . . influencing," as used in the Louisiana statute, is exactly the same as the language in the *Buckley* statute, validated by the United States Supreme Court, as long as the application of the words are limited to "express advocacy." The District Court stated:

> The Court does not believe that the plaintiff has shown how this Louisiana statute or this set of Louisiana statutes as written is distinguishable from the other statutes that have been interpreted and whose wording has been upheld. The language used in the Louisiana statute is patterned after and is identical to the language used and actually approved in Buckley.[19]

* * * *

The Center is incorrect in its contention that "express advocacy" is not the standard under the CFDA.[27] *Buckley* makes clear that speech must rise to the level of "express advocacy" in order to be subject to disclosure. The Louisiana definition of "expenditure" must therefore be—and is intended to be—interpreted consistently with that directive. And, since the definition of expenditure examined in *Buckley* included the same language as that in the Louisiana statute, "for the purpose of . . . influencing," an election, no constitutional infirmity is presented.

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[19] Tr. 88.

[27] R. 10.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNITED STATES OF AMERICA,

No. 04-30877 consolidated with 05-30212

CENTER FOR INDIVIDUAL FREEDOM,
Plaintiff-Appellant,

v.

PAUL J. CARMOUCHE, DISTRICT ATTORNEY, 1ST JUDICIAL DISTRICT; ROBERT ROLAND, CHAIRMAN, T.O. PERRY, JR., VICE CHAIRMAN, JOHN W. GREENE, E.L. GUIDRY, JR., R.L. HARGROVE, JR., MICHAEL J. KANTROW, SR., JOSEPH MASELLI, HENRY C. PERRETT, JR., ASCENSION DELGADO SMITH, DOLORES SPIKES, EDWIN O. WARE, III, OF THE LOUISIANA BOARD OF ETHICS AND THE SUPERVISORY COMMITTEE FOR CAMPAIGN FINANCE,
Defendants-Appellees.

ON APPEAL FROM A DECISION AND JUDGMENT OF
THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA

PETITION FOR EN BANC REHEARING SUBMITTED
ON BEHALF OF DEFENDANTS-APPELLEES,
THE LOUISIANA BOARD OF ETHICS AND
ITS INDIVIDUAL MEMBERS

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* * * *

The Board and Staff are keenly aware of Your Honors pronouncements in 5th CIR R. 35.1. providing sanctions against a party who submits a non-meritorious petition for rehearing en banc. These issues compel en banc consideration for the following reasons: . . . The Louisiana statute was carefully crafted to comport with the *Buckley* language and the *McConnell* guidelines;

* * * *

The Center brought this action in the United States District Court for the Western District of Louisiana on August 26, 2004, requesting a temporary restraining order enjoining the Board from enforcing provisions of the CFDA. After injunctive relief was denied, the Center chose not to run the proposed advertisements. The Center's complaint challenged the "expenditure" standard established by Louisiana law; the challenged statute was carefully modeled after the statute in *Buckley* to ensure constitutionality. It named as *Ex Parte Young* defendants the members of the Louisiana Board of Ethics who, sitting as the Supervisory Committee for Campaign Finance, are charged with civil enforcement and construction of the challenged provisions.

The Board opposed the proceeding, arguing that the challenged provisions of the CFDA are constitutionally firm, that emergency relief would seriously disrupt the then-impending election, and that there were threshold obstacles to relief. The District Court denied preliminary injunctive relief, holding the challenged provision "for the purpose of . . . influencing," as used in the Louisiana statute, is exactly the same as the language in the *Buckley* statute, validated by the U.S. Supreme Court.[7]

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[7] Tr. 89.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-30212

CENTER FOR INDIVIDUAL FREEDOM,
Plaintiff-Appellant,

v.

PAUL J. CARMOUCHE, DISTRICT ATTORNEY, 1ST JUDICIAL DISTRICT; ROBERT ROLAND, CHAIRMAN, T.O. PERRY, JR., VICE-CHAIRMAN, JOHN W. GREENE, E.L. GUIDRY, JR., R.L. HARGROVE, JR., MICHAEL J. KANTROW, SR., JOSEPH MASELLI, HENRY C. PERRETT, JR., ASCENSION DELGADO SMITH, DOLORES SPIKES, EDWIN O. WARE, III, OF THE LOUISIANA BOARD OF ETHICS AND THE SUPERVISORY COMMITTEE FOR CAMPAIGN FINANCE,
Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Louisiana

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STATEMENT OF THE FACTS

The Center and Its Activities

Plaintiff-appellant Center "is a non-partisan, non-profit organization whose mission is to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution." R. 3. It is headquartered in and organized under the laws of Virginia, and is tax exempt under § 501(c)(4) of the Internal Revenue Code. R. 4.

"The Center seeks to focus public, legislative, and judicial attention on the rule of law as embodied in the federal and state constitutions and structural protections that constrain and disperse governmental authority." R. 3. "It also seeks to foster intellectual discourse and to promote education that reaffirms the imperatives of the U.S. Constitution as they relate to contemporary conflicts." *Id.* "For example, in 2003 the Center broadcast advertisements in Louisiana concerning the need to provide prompt confirmation votes for nominees to the federal bench." *Id.* The Center's goals, principles, and nationwide activities are more fully described at its Internet website at <http://www.cfif.org>. *Id.*[1]

* * * *

[1] The Center's Louisiana activities and interests are part of a broader mission. "[S]ince 2000 the Center has spoken out on . . . similar issues of public importance in other states and nationwide. For example, the Center has run broadcast and print advertisements in the District of Columbia and the States of Illinois, Maryland, North ~~Dakota~~, and Virginia, as well as nationally, on matters of public importance ranging from the dire need to confirm federal judges to taxation issues to concerns about public corruption to the right of citizens not to be compelled to fund speech with which they disagree." R. 3, 45.